SUPERINTENDENT OF LAND AND SURVEY KUCHING & ANOR v. BISI JINGGOT & ORS

COURT OF APPEAL, PUTRAJAYA
AZIZAH NAWAWI JCA
MOHAMED ZAINI MAZLAN JCA
ALWI ABDUL WAHAB JCA
[CIVIL APPEAL NO: Q-01(IM)(NCvC)-245-05-2021]
22 NOVEMBER 2024

Abstract – *(i) A claim alleging fraud must be specifically pleaded in the statement of claim with sufficient particulars; a general allegation of fraud, or an allegation of fraud introduced only in a reply to the statement of defence, is insufficient; (ii) A claim for recovery of damages related to land alienation is statute-barred if filed beyond the prescribed limitation period which, in this case, was almost 26 years after the alienation, and the discovery of alleged fraud at a later date does not restart the limitation period if fraud was not properly pleaded as the cause of action.*

CIVIL PROCEDURE: *Statement of claim – Pleadings – Fraud – Allegations of fraud surrounding alienation of land – Whether particulars of fraud pleaded – Whether general allegations of fraud sufficient – Whether fraud could be pleaded in reply to statement of defence*

CIVIL PROCEDURE: *Statement of claim – Striking out – Application for determination of questions of law without full trial – Whether declaratory orders sought sustainable – Whether action ought to be struck out – Rules of Court 2012, O. 14A, O. 33 r. 2 & O. 92*

LAND LAW: *Native customary rights – Alienation of land – Native customary rights land alienated to third party – Claim for damages – Whether claim for damages statute-barred – Whether discovery of fraud relevant for computation of limitation period – Land Code (Sarawak) (Cap 81), s. 202 – Limitation Ordinance (Sarawak) (Cap 49), s. 18 – Public Authorities Protection Act 1948, s. 2(a)*

LIMITATION: *Cause of action – Accrual – Land dispute – Native customary rights land alienated to third party – Claim for damages – When limitation period accrued – Whether claim statute-barred – Land Code (Sarawak) (Cap 81), s. 202 – Limitation Ordinance (Sarawak) (Cap 49), s. 18 – Public Authorities Protection Act 1948, s. 2(a)*

At the High Court, the first respondent ('first plaintiff') claimed to have acquired and/or purchased native customary rights ('NCR'), within the lands alienated to Lembaga Amanah Kebajikan Darul Falah ('third defendant') in 1993. According to the first plaintiff, he had purchased the NCR land by way of sale and purchase agreements ('SPAs') with the NCR landowners, made

on diverse dates between 2016 and 2018. The other respondents ('plaintiffs') claimed that they acquired and/or inherited the NCR land from the original settlers and/or persons who created the NCR in the said land in 1940s. The original owners had caused to be inherited the said NCR land to their descendants, the vendors in the SPAs with the first plaintiff. The first plaintiff had lodged reports with the Malaysian Anti-Corruption Commission ('MACC') pursuant to the said alienation. Three questions of law were framed: (i) whether, having regards to the decision of the Federal Court in *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals*, the remedy for the plaintiffs' claim, based upon the issuance of the title or alienation of land by the first and second appellants ('defendants'), over which the plaintiffs had allegedly created NCR, was for an award of damages and not for declaratory reliefs sought by the plaintiffs in their statement of claim ('SOC'); (ii) in the event that the answer to question (i) was in the affirmative, whether, having regard to the Federal Court's decision in *Husli Mok v. Superintendent Of Lands & Surveys & Anor* ('*Husli*'), the plaintiffs' claim for damages was barred by s. 202 of the Land Code (Sarawak) (Cap 81) ('SLC'); and (iii) in the alternative, whether the plaintiffs' cause of action and/or for the reliefs prayed for in the SOC, was barred by s. 2(a) of the Public Authorities Protection Act 1948 ('PAPA'), having regard to the Court of Appeal's decision in *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors*. The defendants applied for a determination on the questions/issues of law without a full trial, pursuant to O. 14A, O. 33 r. 2 and O. 92 of the Rules of Court 2012. The High Court dismissed the defendants' application. Hence, the present appeal.

Held (allowing appeal with costs)
Per Alwi Abdul Wahab JCA delivering the judgment of the court:

(1a) The Judicial Commissioner ('JC') held that the plaintiffs' action was not statute-barred, under s. 202 of the SLC and s. 2(a) of the PAPA, because s. 18 of the Limitation Ordinance (Sarawak) (Cap 49) ('SLO') provides for the limitation period to be computed from the time of the fraud became known to the plaintiffs. The defendants submitted that fraud related to the issuance of provisional lease over the lots concerned was never pleaded as the plaintiffs' cause of action in their SOC. The plaintiffs, however, claimed that they pleaded fraud under para. 22.2 of their SOC. However, based on para. 22.2 of the plaintiffs' SOC, there was nothing pleaded in relation to fraud committed by the defendants in issuing the provisional lease over the lots concerned, to the third defendant. (paras 18-20 & 22)

(1b) The plaintiffs merely stated that the issuance of the titles was done without their knowledge, thus depriving them of the right and/or opportunity to challenge/dispute the issuance of titles to the third defendant. Even if fraud was pleaded in the SOC, which was not, the particulars of fraud must also be strictly pleaded. A mere general

allegation of fraud was insufficient and the party who alleged such allegation was required to condescend to particulars. The allegation of fraud was only pleaded in the plaintiffs' reply to the first and second defendants' statement of defence. The plaintiffs should not be allowed to plead fraud in their reply, departing from their original cause of action in their SOC. (paras 22, 23 & 28)

(2) The plaintiffs' claim was filed beyond the prescribed timeline, *ie*, more than three years after the plaintiffs became aware of the alienation of the subject lands to the third defendant, as evidenced by their letter to the MACC. The JC's reliance on the date of the alleged discovery of fraud, in 2016, was plainly misplaced in determining when the limitation accrued. (para 36)

(3) Based on the authority of *Husli*, the plaintiffs' claim for recovery of damages was statute-barred as it was filed almost 26 years after the right to seek compensation accrued, considering the alienation of the lands that took place in 1993. (para 39)

(4) The questions and issues of law, as framed, were suitable to be determined without a full trial. The declaratory orders sought by the plaintiffs, as per their SOC, were unsustainable and the action ought to be struck out. The order of the High Court was set aside. (paras 50-52)

Case(s) referred to:

Husli Mok v. Superintendent Of Lands & Surveys & Anor [2014] 9 CLJ 733 FC ***(refd)***
Khazanah Jaya Sdn Bhd v. Hisco (Malaysia) Sdn Bhd [2021] CLJU 2196; [2021] 1 LNS 2196 CA ***(refd)***
Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 CLJ 880 CA ***(refd)***
Mat Bin Lim & Anor v. Ho Yut Kam & Anor [1966] CLJU 99 HC ***(refd)***
Ng Ah Ba & Ors v. Ramanda Sdn Bhd [1996] 1 CLJ 738 CA ***(refd)***
Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors [2010] 10 CLJ 383 HC ***(refd)***
TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals [2018] 1 CLJ 19 FC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 68(1)(f)
Public Authorities Protection Act 1948, s. 2(a)
Rules of Court 2012, O. 14A, O. 33 r. 2, O. 92
Land Code (Sarawak) (Cap 81), ss. 5(2)(i)(b), 197, 202
Limitation Ordinance (Sarawak) (Cap 49), s. 18

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[Editor's note: For the High Court judgment, please see Bisi Jinggot & Ors v. Superintendent Of Lands And Surveys Kuching & Ors [2021] CLJU 722; [2021] 1 LNS 722 (overruled).]

Reported by Najib Tamby

A

JUDGMENT

Alwi Abdul Wahab JCA:

Introduction

B **[1]** This is an appeal by the appellants against part of the High Court's decision in dismissing the appellants' application for determination on questions/issues of law without a full trial of this action under O. 14A, O. 33 r. 2 and O. 92 of the Rules of Court ("ROC" (encl. 111)) given on 16 April 2021.

C **[2]** For ease of reference, the parties in this appeal are referred to as they were named in the High Court, the plaintiffs being the respondents, and the first and second defendants as the appellants.

[3] The following questions of law as framed are as follows:

D (i) whether, having regards to the decision of the Federal Court in *TH Pelita Sadong Sdn Bhd & Anor v. TR Nyutan Jami & Ors And Other Appeals* [2018] 1 CLJ 19 the remedy for the plaintiffs' claim based upon the issuance of title or alienation of land by the first and second defendants over which the plaintiffs had allegedly created native customary rghts ("NCR") is for an award of damages and not for declaratory reliefs E sought by the plaintiffs in their statement of claim;

(ii) in the event that the answer to question (i) is in the affirmative, whether having regard to the Federal Court's decision in *Husli Mok v. Superintendent Of Lands & Surveys & Anor* [2014] 9 CLJ 733, the plaintiffs' claim for damages herein is barred by s. 202 of the Sarawak F Land Code (Cap. 81 (1958 edn)); and

(iii) in the alternative, whether the plaintiffs' cause of action and/or for the reliefs prayed for in the statement of claims is barred by s. 2(a) of the Public Authorities Protection Act 1948 having regard to the Court of Appeal's decision in *Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd* G *& Ors* [2014] 1 CLJ 880.

[4] The first and second defendants (collectively referred to as the defendants unless specifically stated otherwise) took the position that the above questions or issues of law based on the undisputed facts pleaded in the H statement of claim should be determined without a full trial as the determination of these questions or issues is likely to finally or substantially dispose of the plaintiffs' claims. Further, the defendants contend that the determination of the said questions or issues of law would also demonstrate that the plaintiffs' action against the defendants is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court.

I

[5] As a preliminary issue, the plaintiffs contend that the appeal mounted by the defendants is non-maintainable, relying on the amendment to the Courts of Judicature Act 1964 ("CJA"), specifically s. 68(1)(f), which expressly precludes an appeal to the Court of Appeal from a High Court's decision dismissing an application to strike out any writ or pleading.

[6] It is noteworthy that the defendants' application, filed on 15 October 2020, predates the amendment to the CJA *via* the Courts of Judicature (Amendment) Act 2022 (Act A1661), which came into force on 1 October 2022. Consequently, the present matter does not fall within the scope of the amendment.

Background Facts

[7] The plaintiffs are claiming native customary rights (NCR) in the land approximately 224.41 acres in total within lots 85 and 86 both in Block 1 Matang Land District (hereinafter the said lands) that was alienated to the third defendant on 15 April 1993.

[8] In particular, the first plaintiff is claiming to have acquired and/or purchased the NCR land within the said lands by way of a number of sale and purchase agreements with NCR landowners made on diverse date between 2016 and 2018.

[9] As to the other plaintiffs in this action, they are claiming that they acquired and/or inherited the NCR land from the original settlers and/or person who created NCR in the said lands sometime in 1940s. The original owners have caused to be inherited the said NCR lands to their descendants, the vendors in the sale and purchase agreements with the first plaintiff.

[10] The sale and purchase agreements were effective in transferring and/or assigning the NCR in the said NCR lands to the first plaintiff by virtue of the 2013 amendment to s. 5(2) proviso (i)(b) of the Sarawak Land Code (Cap. 81). The inheritance of the other plaintiffs is also covered by the same provision to the said amendment.

[11] Sometime in early July 2016 prior to entering into the sale and purchase agreements, the plaintiffs discovered that in 1972 there was a settlement survey exercise conducted by the first defendant in the area. The discovery of the "Survey D-Book" during the settlement survey exercise have recorded the names of various claimants of NCR in the land being surveyed, including vendors descendants/parents/family members in the first plaintiff's sale and purchase agreements and descendants/parents/family members of the other plaintiffs in this action.

[12] Despite the completion of the settlement survey exercise and the absence of any extinguishment of NCR over the said NCR lands, the first defendant, in breach of fiduciary duty and/or fraudulently alienated to the third defendant on 15 April 1993, without the knowledge or consent of the plaintiffs.

[13] The first plaintiff had lodged reports with Malaysian Anti-Corruption Commission *vide* letter dated 15 February 1995 pursuant to the said alienation.

In The High Court

[14] In dismissing the defendants' application, the learned Judicial Commissioner ("JC") held as follows in her grounds of judgment:

> [25] In respect of the first and second defendant's NOA at Enclosure 111, the first question posed are whether the decision of the Federal Court in *TH Pelita Sadong Sdn Bhd* that the remedy available to the plaintiffs is only for an award of damages and not for declaratory reliefs as sought by the plaintiffs in their statement of claim.
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> [26] Applying the principles in *Kerajaan Negeri Kelantan v. Petroliam Nasional Berhad & Other Appeals* [2014] 7 CLJ 597, which allows for O. 14A application only if the points of law to be determined thereunder have been stated in clear and precise terms and the facts disclosed by the pleadings and affidavit evidence are sufficient for the court to make such determination which would be final as to the entire cause or matter. The facts in this case is different from those in *TR Nyutan*'s case cited by the first and second defendants as the rights are yet to be determined in this case and there is an issue of fraud raised hence the legal principles and law therein are not applicable in this action. I found that the cases are clearly distinguishable, making them not suitable for an application under O. 14A ROC 2012 in this action especially on the issue of the existence of the "Survey D-Book".
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> [27] Secondly on the issue of the plaintiffs claim being barred by virtue of section 202 of the Sarawak land Code and section 2(a) of the Public Authorities Protection Act 1948, it must be said that the action is not statute barred as the limitation period is computed from the date of discovery of the fraud by the plaintiffs which was on 28.07.2016 when they discovered that a settlement exercise had being conducted sometime in 1972 and the same was recorded in the "Survey D-Book". Section 18 of the Sarawak Limitation Ordinance provides for the limitation period to be computed from the time the fraud became known to the plaintiffs. This follows this line of argument must fail too.
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> [28] Premised on the above and applying the same, because of the issue of fraud raised by the plaintiffs, Order 14A would not be a suitable application to dispose of the matter pertaining to Enclosure 111. Consequently, Enclosure 111 ought to be struck out and cost in the cause and the matter to proceed to trial.

The Present Appeal

[15] We shall now deal with the three questions or issues of law in turn.

First Question Of Law: Whether, Having Regards To The Decision Of The Federal Court In TH Pelita Sadong Sdn Bhd v. TR Nyutan & Ors [2018] 1 CLJ 198 The Remedy For The Plaintiffs' Claim Based Upon The Issuance Of Title Or Alienation Of Land By The First And Second Defendants Over Which The Plaintiffs Had Allegedly Created Native Customary Rights ("NCR") Is For An Award Of Damages And Not For Declaratory Reliefs Sought By The Plaintiffs In Their Statement Of Claim

The Issue Of Fraud

[16] The learned JC in her decision found that the facts in *TR Nyutan*'s (*supra*) is distinguishable from the present case as the plaintiffs herein raised an issue of fraud which the plaintiffs discovered on 28 July 2016 in relation to the settlement exercise conducted by the first defendant in 1972 and the same was recorded in the "Survey D-Book".

[17] Since the plaintiffs' statement of claim was filed on 23 July 2019 after the plaintiffs became aware of the fraud on 28 July 2016, it was the plaintiffs' contention that their action herein is well within three years either under s. 202 of the Land Code or s. 2(a) of the Public Authorities Protection Act 1948 ("PAPA") which the learned JC agrees as can be seen from the above relevant paragraph of her grounds of decision.

[18] Thus, the learned JC held that the plaintiffs' action is not statute barred under s. 202 of the Land Code and s. 2(a) of the PAPA because s. 18 of the Sarawak Limitation Ordinance provides for the limitation period to be computed from the time of the fraud became known to the plaintiffs (see para. 27 of the learned JC's grounds of decision).

[19] Before us, it was submitted by the defendants that fraud related to the issuance of provisional lease over lots 85 and 86 was never pleaded as the plaintiffs' cause of action in their statement of claim and it was rather pleaded in the plaintiffs' reply to the first and second defendants' statement of defence.

[20] The plaintiffs however claimed that they have pleaded fraud under para. 22, in particular, sub-para. 22.2 of the plaintiffs' statement of claim.

[21] Subparagraph 22.2 of the plaintiffs' statement of claim is reproduced as follows:

> The alienation and issuance of titles to Lots 85 and 86 in 1993 was done discreetly without the knowledge of the plaintiffs and/or the Original Owners who are in continuous occupation of the NCR lands, depriving the plaintiffs and/or the Original Owners the right and/or opportunity to challenge/dispute the issuance of title to the third defendant.

[22] Upon cursory reading of the above sub-para. 22.2 of the plaintiffs' statement of claim, there is nothing pleaded in relation to fraud committed by the defendants in issuing the provisional lease over lots 85 and 86 to the third defendant. The plaintiffs merely stated that the issuance of the titles was done without their knowledge, thus depriving them of the right and/or opportunity to challenge/dispute the issuance of titles to the third defendant. Even if fraud is pleaded in the statement of claim but in this case, there is none, the particulars of fraud must also be strictly pleaded. It is trite law that a mere general allegation of fraud is insufficient and the party who alleges such allegation is required to condescend to particulars (*Ng Ah Ba & Ors v. Ramanda Sdn Bhd* [1996] 1 CLJ 738).

[23] In any event, the allegation of fraud was only pleaded in the plaintiffs' reply to the first and second defendants' statement of defence where under paras. 6 and 8 of the same, taken cumulatively, the plaintiffs pleaded that the first defendant had fraudulently issued the provisional lease over the subject lots when the first defendant knew that the various field lots including lots 85 and 86 had been created and marked from the survey exercise that has been carried out earlier on those lands and supposedly awaiting for the respective titles to be issued but subsequently the plaintiffs found that the subject lots were issued with the provisional lease to the third defendant.

[24] The defendants submitted that the learned JC should not have considered fraud to determine when the cause of action accrues in the present appeal. The particular details of fraud in the reply to the first and second defendants' statement of defence would constitute a new cause of action which defeats the defendants' pleaded defence of limitation. It was further submitted that the plaintiffs should not be allowed to fill in the gap to put in fraud through the reply when they failed to plead it in their statement of claim.

[25] The issue before this court is whether the plaintiffs can be allowed to plead fraud in their reply when they should have pleaded it in their statement of claim instead as their cause of action at the very beginning.

[26] On this issue, we find support from the case of *Mat Bin Lim & Anor v. Ho Yut Kam & Anor* [1966] CLJU 99; [1966] 1 LNS 99; [1967] 1 MLJ 13 where His Lordship Raja Azlan Shah held that the plaintiffs could not rely on an acknowledgment of liability of the insurance company which was pleaded for the first time in their reply to the defendants' statute of limitations defence as the same should be pleaded in their original statement of claim.

[27] *Mat Lim*'s case (*supra*) was cited with approval in the recent Court of Appeal's case of *Khazanah Jaya Sdn Bhd v. Hisco (Malaysia) Sdn Bhd* [2021] CLJU 2196; [2021] 1 LNS 2196 on the principle that a reply cannot be inconsistent with any previous pleading, nor can it raise a new ground or claim. The Court of Appeal held as follows:

[42] In so stating we are cognizant of the principle that in a reply to defence, the plaintiff cannot be inconsistent with any previous pleading, nor raise a new ground or claim. In *Mat bin Lim & Anor v. Ho Yut Kam & Anor* [1967] 1 MLJ 13, Raja Azlan Shah J (as HRH then was) said:

> That being the case, the reply must not depart from the statement of claim. In this connection I may as well adopt a passage from the current edition of Bullen & Leake's "*Precedents and Pleadings*" (11th Edn.) at page 694:
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> > The plaintiff, however, must not set up in his reply a new cause of action which is not raised either on the writ or in the statement of claim; it is provided that 'no pleading shall, except by way of amendment, raise any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same'. In other words the reply must not contradict or 'depart' from the statement of claim.

[43] The function of a reply in the overall scheme of pleadings in a civil action was considered and well expressed by the Singapore Court of Appeal in *Romar Positioning Equipment Pte Ltd v. Merriwa Nominees Pty Ltd* [2004] SGCA 44, where the Court held:

> It bears remembering that the function of a reply is to allow the plaintiff to raise facts in answer to the defendant's case. In particular, it will be necessary to file a reply if the defendant raises a new issue for the first time in the defence. As the function of a reply is limited to answering matters raised in the defence, it follows that the reply should not be used as an avenue to introduce new causes of action which are not raised in the statement of claim. If a plaintiff wishes to raise an additional and inconsistent claim in the alternative after the statement of claim has been filed, the proper approach should be to apply to amend the statement of claim, rather than slip it in by way of the reply.

[28] Based on the above authorities, we are of the view that the plaintiffs in the present appeal should not be allowed to plead fraud in their reply departing from their original cause of action in their statement of claim.

Report To The Malaysian Anti-Corruption Commission ("MACC")

[29] From the plaintiff's own pleaded facts in the statement of claim (sub-para. 22.4 of the plaintiffs' statement of claim), the plaintiff had lodged a report with the MACC regarding the issuance of the provisional lease to the third defendant *vide* their letter dated 15 February 1995 and the other letter on 16 July 2018 after the alienation of lots 85 and 86 to the third defendant on 15 April 1993. This signifies the plaintiffs' knowledge of the said alienation which affected their right over their NCR claim but only took out the present action on 23 July 2019 more than three years outside the period of limitation prescribed by s. 202 of the Land Code and s. 2(a) of the PAPA.

[30] The above pleaded fact on the report lodged by the plaintiffs to the MACC was not considered by the learned JC in dismissing the defendants' application, instead the learned JC was more inclined to rely on the date of discovery of fraud on 28 July 2016 when the plaintiffs' cause of action was not founded on fraud as the plaintiffs had never pleaded the existence of fraud in the plaintiffs' statement of claim to begin with. In our view, the limitation period should run from the date that the plaintiffs became aware of the alienation which is clearly indicated by their letter to the MACC.

[31] Apart from the issue of fraud, the learned JC further distinguished the facts of the case in the present appeal with the facts of the case in *TR Nyutan* (*supra*) where the learned JC says that the right of the plaintiffs' NCR in the present appeal is yet to be established as opposed to *TR Nyutan*'s case (*supra*) wherein the claim of NCR had been established and recognised by the court.

[32] We are of the view that even if the plaintiffs have yet to establish their claim over their NCR lands in the present appeal, but once it is established, their remedy as the result of such alienation is for compensation and damages which is provided under s. 197 of the Land Code. Such is the principle propounded in *TR Nyutan*'s case (*supra*) that the statutory remedy for any person who is deprived of any land but barred from bringing an action either against the registered proprietor on account of the indefeasibility of title or against the Government for the recovery of that land is to seek compensation pursuant to that section of the Land Code.

[33] In *TR Nyutan* (*supra*), the Federal Court held as follows:

> [50] The Legislature of Sarawak has prescribed a statutory remedy for any person who is deprived of any land but barred from bringing an action either against the registered proprietor on account of indefeasibility of title or against the government for the recovery of that land, to seek compensation from the government, under s. 197 of the Sarawak Land Code which provides as follows:
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> 197. Compensation for loss.
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> Any person who is deprived of any land, or of any estate or interest therein, by reason of any of the provisions relating to inde feasibility contained in sections 132, 133 and 134 and who is by reason thereof barred from bringing an action against the registered proprietor for possession, or other action for the recovery of that land, estate or interest, may bring an action against the Government for recovery of damages.

[34] At para. 58 of the judgment, the Federal Court further held:

> [58] For the reasons adumbrated above, we answer the questions of law posed in these appeals in the following manner:
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> (i) ...
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> (ii) third and fourth defendants' appeal

> We answer the question of law posed in the third and fourth defendants' appeal in the affirmative. We find that the proper remedy for infringement of NCR as a result of the issuance of title or alienation of NCR, where such rights subsist without extinguishment was an award of damages and not a declaration to nullify the title issued or the rectification of such title issued to third parties.

[35] Reverting to the first question posed by the defendants in the present appeal, we find that the answer to this question is in the affirmative and since this action was filed some 24 years after the plaintiffs became aware of the alienation of the subject lands, it is therefore time-barred and liable to be struck off. The limitation period is computed from the date of the plaintiffs' letter to the MACC in 1995 complaining against the first defendant on the alleged abuse of power in the alienation process of the subject lands.

Second Question Of Law: In The Event That The Answer To Question (i) Is In The Affirmative, Whether Having Regard To The Federal Court Decision In Husli Mok v. Superintendent Of Lands & Surveys & Anor [2014] 9 CLJ 733, The Plaintiffs' Claim For Damages Herein Is Barred By Section 202 Of The Sarawak Land Code [Cap. 81 (1958 Edn)]

[36] In determining the first question of law, we have concluded that based on the factual matrix of this case, the plaintiffs' claim was filed beyond the prescribed timeline, *ie*, more than three years after the plaintiffs became aware of the alienation of the subject lands to the third defendant as evidenced by their letter to the MACC in 1995. The learned JC's reliance on the date of the alleged discovery of fraud on 28 July 2016 was plainly misplaced in determining when the limitation accrues.

[37] In *Husli Mok* (*supra*), the Federal Court held:

> [26] The basis of the plaintiffs complaint is that the deceased's NCR land had been amalgamated with other lands, subdivided and then, the subdivided lots which included the deceased's NCR land alienated to SEDC. The plaintiff was right in contending that the alienation of the land to SEDC was unlawful as no compensation was paid by the government under s. 15 of the Land Code wherein the deceased or his estate suffered loss and damage. *We are in the view that upon alienation of the land to SEDC the rights of the deceased to the land had been extinguished or he had been deprived of the land and his right to seek compensation against the government under s. 197 of the Land Code accrued. His action however was barred by limitation as it was filed outside the period of limitation prescribed by s. 202 of the Land Code*. On this point we agree with the finding of the Court of Appeal that the plaintiff commenced his action in the High Court in April 1996, some 15 years from 1981 (the year the deceased's application was rejected) or alternatively nine years from 1987 (the year the land was alienated to SEDC without extinguishment of the NCR). In either case the commencement of action by the plaintiff was time barred.
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> (emphasis added)

[38] Section 202 of the Sarawak Land Code (Cap. 81) provides:

> No action for recovery of damages as aforesaid shall lie or be sustained against the Government unless the action is commenced within a period of three years from the date when the right to bring the action accrued:
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> Provided that any person under the disability of infancy or unsoundness of mind may bring such an action within three years from the date upon which the disability ceased.

[39] Based on the authority of *Husli Mok* (*supra*), the plaintiffs' claim for recovery of damages is statute-barred as it was filed almost 26 years after the right to seek compensation accrued considering the alienation of the lands that took place in 1993. Consequently, the plaintiffs' claim ought to be dismissed.

[40] In *Husli Mok* (*supra*), the Federal Court also held that in the event of the alienation of land, the right to the NCR is extinguished and the statutory remedy is to seek compensation against the Government under s. 197 of the Land Code. Regardless of whether the NCR has been established, once the land is alienated, it is extinguished. In the present appeal, even assuming that the NCR over lots 85 and 86 had been established, the third defendant's right being the registered proprietor of the subject lands after the alienation is indefeasible as rightly held by the learned JC relying on the case of *Nikodemus Singai & Ors v. Sibu Slipway Sdn Bhd & Ors* [2010] 10 CLJ 383. Furthermore, as against the third defendant, there is no allegation of fraud nor conspiracy with the first and second defendants in the alienation process of the subject lands.

[41] Based on the authority of *TR Nyutan* (*supra*) and further strengthened by the authority of *Husli Mok* (*supra*), even if the purported NCR was proven, the fact that there was no extinguishment when the lands were alienated does not exclude the application of s. 197 of the Land Code in remedying a native who is deprived of his NCR land in the form of damages. This is amply shown in *Husli Mok* (*supra*) where the court held:

> [24] We are of the view when the Legislature uses the words "any land" in s. 197 of the Land Code, it must have intended to refer to all or any of the category of land stated above. For the words "any person" in s. 197 of the Land Code it must be interpreted that it does not intend to restrict the application of that section only to those persons whose interests are registered in the Land Registers or "registered proprietors" as provided in s. 113 of the Land Code. The words "any person" must also apply to any native such as the plaintiff who has native customary rights and deemed to hold the land which is State land as licensee from the Government.
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> [25] We are also of the view to restrict the application of s. 197 of the Land Code to only "registered land or registered interest in land" could result in an absurdity. It would then appear that NCR landowners without

titles to their land cannot institute an action for recovery of compensation against the government if they were deprived of their NCR land. With respect that could not have been the intention of the Legislature.

[42] Additionally, in *Husli Mok* (*supra*), His Lordships, Zulkefli CJ (Malaya) in delivering judgment of the court further held:

> [27] We shall now deal with question (2) posed in this appeal. We are of the view if question (1) is answered in the affirmative and the plaintiff's right to recovery of damages barred by limitation, the declarations sought for by the plaintiff would be futile. The grant of declaration is in the discretion of the court. The court will not act in vain and grant declarations that are of no utility or in regard to matters which are no longer 'live issue' or has become academic. In support of this proposition we would refer to the following passage of the judgment of Wan Adnan J (as he then was) in *Pedley v. Majlis Ugama Islam Pulau Pinang & Anor* [1990] 2 MLJ 307 at p. 308 as follows:
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> > The power of the Court to make a declaratory Judgment is discretionary. The Court will not make a declaratory judgment when the question raised is purely academic. The Court should not be required 'to answer academic question' - *Howard v. Pickford Tool Co Ltd* [1951] 1 KB 417. Although the remedy by way of declaration is wide and flexible yet it will not be granted to a plaintiff whose claim is too indirect and unsubstantial and would not give him 'relief' in any real sense, that is relieve him of any liability or disadvantage or difficulty: *Thome Rural District Council v. Bunting* [1972] 1 All ER 439.

[43] We find that upon the determination of the above questions of law, the declaratory reliefs sought by the plaintiffs as per their statement of claim would be futile as the whole action against the defendants is legally untenable for the claim is scandalous, frivolous or vexatious or is otherwise an abuse of the process of the court.

Third Issue: In The Alternative, Whether The Plaintiffs' Cause Of Action And/Or For The Reliefs Prayed For In The Statement Of Claims Is Barred By Section 2(a) Of The Public Authorities Protection Act 1948 Having Regard To The Court Of Appeal's Decision In Litus Jau & Anor v. Boustead Pelita Tinjar Sdn Bhd & Ors [2014] 1 CLJ 880

[44] In *Litus Jau & Anor* (*supra*), the court held that there was a delay in commencing this action by the plaintiffs nearly 20 years following the issuance of the provisional lease to the first defendant in 1992 beyond the timeline permitted under s. 2(a) of PAPA.

[45] Section 2(a) of PAPA states:

> Where, after coming unto force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any

whiten law or any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, the following provisions shall have effect:

> (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within thirty six months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within thirty six months next after the ceasing thereof.

[46] In the present appeal, the delay is 26 years from the date of the alienation of the NCR lands in 1993 or 24 years from the date the plaintiffs became aware of the said alienation which the plaintiffs claimed of the alleged fraud committed by the defendants resulting in the report to the MACC in 1995.

[47] The Court of Appeal in that case held:

> [33] Against this backdrop the plaintiffs instituted an action against the defendants. The issue now is when the plaintiffs' cause of action accrued. Looking at the facts objectively it is safe to conclude that the plaintiffs' cause of action against the second and third defendant accrued after the issuance of the provisional lease in 1992. Given this scenario and premised on the 36 months limitation provided under s. 2(a) of the PAPA, there can be no doubt that the plaintiffs' action against the second and third defendant is time barred as the suit was brought nearly 20 years after the issuance of the provisional lease which is beyond the statutory timeline permitted.
>
> [34] However on a different note, assuming there was indeed continuous injury and damage as the plaintiffs allege, can the plaintiffs rely on the second limb of s. 2(a) to defeat the issue of limitation? The way we perceive it, the answer to this question lies in the conduct of the plaintiffs on this matter. In this regard, it is undisputed that the plaintiffs took nearly twenty years to bring this action. This clearly shows that if they had any rights indeed, which has been infringed, and as a result thereof they have continued to suffer, an action should have been commenced promptly. However, the facts of this case certainly does not support the existence of a continuing injury or damage as whatever injury was caused by a single act of the second defendant in issuing the provisional lease some 20 years ago. During this time the first defendant managed to complete their oil palm plantation, and there were two compulsory land acquisition on two different occasions. The plaintiffs did not challenge these acquisitions. As such the irresistible conclusion that can be drawn from this factual scenario is that whatever rights the plaintiffs have had been defeated as they had slept over it or acquiesced to the infringement of their rights. As rightfully pointed out by learned counsel for the second and third defendants since the plaintiffs did not take any action to protect their purported rights, it raises serious doubts on the bona tides of their

NCR claim. Thus, in our judgment, having taken into account the facts and circumstances of the instance case, we find that the plaintiffs' claim against the second and the third defendant is hereby caught by limitation under s 2(a) of the PAPA.

Conclusion

[48] As alluded to earlier, the remedy for the plaintiffs' claim based upon the issuance of title or alienation of the NCR lands over which the plaintiffs had allegedly created or acquired NCR is for an award of damages on the authority of *TR Nyutan*'s case (*supra*).

[49] The plaintiffs' complaints of being deprived of the subject lands as well as being barred from bringing an action against the registered proprietor of the subject lands on account of the indefeasibility of title or against the Government for the recovery of the same could be compensated by way of damages pursuant to s. 197 of the Land Code.

[50] Having heard and considered the submissions by the parties, we find merits in the present appeal that the questions and issues of law as framed above are suitable to be determined without a full trial.

[51] Based on all the above reasons, we are unanimously of the view that the declaratory orders sought by the plaintiffs as per their statement of claim were unsustainable and this action ought to be struck out.

[52] Thus, we allowed the appeal with costs of RM10,000 (in here and below) to the defendants. The order of the High Court is hereby set aside.